IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.6847 OF 2006

M/s Sinew Developers Ltd. ...Petitioner

Versus

M/s Mangal Murti Properties & Ors. ...Respondents

Shri N.V.Walawalkar, Sr counsel for the Petitioner.
Shri R.V.Pai for the Respondent No.1.

CORAM : ABHAY S.OKA, J.
DATED : JUNE 21, 2007.

P.C.:

1. Heard the learned counsel appearing for the parties. By this Petition under Article 227 of the Constitution of India, the Petitioner who is the original third Defendant has taken an exception to the order dated 29th June, 2006 passed by the learned trial Judge by which it was held that the Application at Exhibit 23 made by the Petitioner was not maintainable and hence it stands rejected.

2. The first Respondent herein is the original Plaintiff. The Petitioner filed an Application at Exhibit 23 invoking the provisions of section 9A of the Code of Civil Procedure, 1908 praying for framing an issue regarding maintainability and jurisdiction and for a further direction for trying the said issue as a preliminary issue. By the order dated 29th April, 2006

the said Application was disposed of by the learned trial Judge by framing an issue regarding jurisdiction of the trial Court. The learned trial Judge directed that the issue will be heard and decided as a preliminary issue. The parties were also granted liberty to lead evidence. By the impugned order, the learned trial Judge has rejected the said Application at Exhibit 23 which was already allowed by passing order dated 29th April, 2006. The grievance of the Petitioner is that there was no occasion for the learned trial Judge to pass the impugned order which has the effect of rejection of the earlier Application at Exhibit 23 which was already allowed. The grievance is that at the time of hearing of preliminary issue in terms of order passed below Exhibit 23, the impugned order has been passed and the learned trial Judge has committed an error by dismissing the Application at Exhibit 23.

3. A learned single Judge of this Court in the case of **Solapur Social Urban Co-operative Bank Ltd Vs. Nigam A. Mannan Beskar [2006 (4) Bombay Case Reporter Page 217]** has held that on coming into force of the amendment to the Code of Civil Procedure, 1908 with effect from 01st July, 2002, section 9A of the said Code as amended in the State of Maharashtra stands repealed. Another learned single Judge passed an order requesting the

Hon’ble the Chief Justice to refer the issue to a larger bench. As of today the reference made to the larger bench is still pending. However, the fact remains that the judgment in the case of Solapur Social Urban Co-operative Bank Ltd (supra) stands as of today and it binds this Court.

4. It must be stated here that in another Writ Petition, this Court has passed an order directing the trial Court to decide the Application for interim relief filed by the first Respondent in accordance with law. It is obvious that as of today in view of the decision of this Court in the case of Solapur Social Urban Co-operative Bank Ltd (supra), the issue of jurisdiction cannot be tried as a preliminary issue at a stage when an Application for temporary injunction is pending. Now the Application for temporary injunction will have to be heard and decided. At the time of hearing of the said Application it is obvious that parties will be permitted to raise all permissible contentions including the contention regarding maintainability of the suit and jurisdiction of the Civil Court to entertain the suit. The order dated 29th April, 2006 passed below Exhibit 23 cannot be now acted upon. However, the said order could not have been set aside by the order impugned in this Writ Petition.

5. Though the order impugned will have to be set aside, the order dated 29th April, 2006 passed below Exhibit 23 will have to be kept in abeyance till the learned trial Judge frames issues at the appropriate stage. At the time of framing issues, it is obvious that the issue of jurisdiction will have to be framed. At that stage, after hearing the parties if the learned Judge is of the view that the issue of jurisdiction is required to be decided as a preliminary issue, the learned trial Judge will proceed to decide the issue of jurisdiction as a preliminary issue in terms of order dated 29th April, 2006 passed below Exhibit 23.

6. Hence, I pass the following order:

(i) The impugned order dated 29th June, 2006 is quashed and set aside and order dated 29th April, 2006 passed below Exhibit 23 is restored.

(ii) However, the trial Court will not implement the said order till the issues are framed. At the time of framing issues, the learned trial Judge will pass appropriate order as indicated in this Judgment.

(iii) Writ Petition is disposed of in above terms.

JUDGE